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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 564.

MASCOT STOVE COMPANY, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF TO RESPONDENT'S OPPOSITION.

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The opposition interposed by the respondent herein undertakes to put out of view the admitted fact that the stockholders of the old company (who put some additional capital into the new company) retained a control of 50 per cent of the property transferred, within the meaning of Section 113(7) of the Revenue Act of 1932.

The decision of the Court in the case of *Rex Manufacturing Company* v. *Commissioner*, 102 Fed. (2d) 325, turns

upon the fact that "a control of the property of 50 per cent or more remained in the same persons or some of them" who were stockholders of the old company; and the fact that "additional capital" was contributed by the stockholders of the old company to the new company, in order to effect the reorganization, was not denominated a purchase of the property by them. The fact that the creditors of the old company (in the *Rex Manufacturing Company case*) accepted notes of new company for 75 per cent of their claims against the old company is not to be distinguished from the receipt of cash or its equivalent (see *LeTulle* v. *Scofield*, 308 U. S. 415). The only distinguishing feature between this case and the *Rex Manufacturing Company case* is that the creditors of the old company (in the *Rex Manufacturing Company case*) took notes and cash distributed to them by the trustee of the bankrupt's estate; while in this case the notes executed by the new company were apparently held by the trustee of the bankrupt's estate until paid off, *when the proceeds were distributed to creditors.* The difference, if any, is certainly not material on the issue of reorganization.

There is certainly no distinction to be made in the two cases on the fact of "continued control of 50 per cent or more in the property transferred." There was the same "break" *in continuity* of ownership of the property in the case of *Rex Manufacturing Company, supra*, by virtue of the bankruptcy proceeding, as there was in this case; and there can be no distinction between the two cases in the degree of "insolvency" at the time of adjudication. The revenue statute does not interpose "insolvency" as a barrier to reorganization; and there is no provision in the law that only solvent corporations (which may or may not be able to pay their debts in full promptly) may become reorganized under the provisions of Sections 112 and 113 of the Revenue Act of 1932.

The intervention of bankruptcy, by which the title to the property of the bankrupt is *vested* in the trustee as *a fidu-*

ciary, is not a barrier to reorganization (see *Rex Manufacturing Company* v. *Commissioner*, 102 Fed. (2d) 325); and there can be no distinction made in the features of a bankruptcy proceeding in the two cases. In the case of a corporate person a proceeding in bankruptcy is uniform throughout the United States. Therefore, since it is conceded by respondent that reorganization was effected in the case of *Rex Manufacturing Company* v. *Commissioner*, 102 Fed. (2d) 325, there appears to be a direct conflict in this case when the Court below holds that a proceeding in bankruptcy is a barrier to reorganization.

The Court below expressly states that in so far as the decision in the case of *Rex Manufacturing Company* v. *Commissioner, supra,* is in conflict with its decision herein, it declines to follow the same. The only distinction between the two cases is that the Circuit Court of Appeals for the Seventh Circuit holds that the intervention of a bankruptcy proceeding is not a barrier to reorganization; while the Sixth Circuit holds such a proceeding to be a barrier. There is, therefore, a definite conflict to be reconciled by this Honorable Court.

There is no evidence in this case that the transfer of the property of the bankrupt's estate to the new company was effected any differently by the Trustee in Bankruptcy than was the transfer made in the *Rex Manufacturing Company case, supra.* In each case there was an *adjudication* which vested the title to the bankrupt's property in the trustee; and thereafter the trustee of the bankrupt's estate (in each case) accepted an offer by stockholders of the bankrupt to form a new company and take over the property. In each case there was a contribution of additional capital; and in each case notes and cash were paid over to the trustee of the bankrupt's estate for distribution to creditors. The features of *continuity* are identical in each case.

It, therefore, cannot be denied that the conflict arises out of the fact of bankruptcy; and inasmuch as there can be no distinction made in the *modus operandi* of a bankruptcy

proceeding in the Seventh Circuit as distinguished from such a proceeding in the Sixth Circuit, the distinction urged by the respondent as between the two cases serves merely to magnify the conflict relied upon by petitioner as a reason for granting the writ.

Respectfully,

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[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 564

MASCOT STOVE COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The petition for a writ herein is predicated in part on an asserted conflict between the instant decision and that in *Rex Mfg. Co.* v. *Commissioner*, 102 F. (2d) 325 (C. C. A. 7th) (Pet. 8). In its brief in opposition the Government disputed the alleged conflict, pointing out that the cases were factually dissimilar and that the case of *D. W. Klein Co.* v. *Commissioner*, then pending in the Circuit Court of Appeals for the Seventh Circuit, raised the precise question here involved which would be passed upon for the first time by the Seventh Circuit in that case.

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The Circuit Court of Appeals for the Seventh Circuit has now held in the *Klein* case that there is no reorganization in the circumstances presented here. *The D. W. Klein Co.* v. *Commissioner,* decided November 28, 1941, not yet reported but may be found in 1941 C. C. H., Vol. 4, ¶9769). The court expressly distinguished the *Rex* case, thus definitely eliminating any suggestion of conflict between the two circuits.

Consistently also with the position taken in the Government's brief in opposition, the court stated that the decision of the question involved would not be governed by this Court's determination of the issues pending before it in *Helvering* v. *Southwest Consolidated Corp., Helvering* v. *Alabama Asphaltic Limestone Co., Bondholders Committee, Marlborough Investment Co.* v. *Helvering,* and *Palm Springs Holding Corp.* v. *Helvering,* Nos. 286, 328, 128 and 129, and 503, respectively, October Term, 1941.

Respectfully submitted.

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